No. 89-1311

In The

Supreme Court of the United States

October Term, 1989

S. MASON CARBAUGH,

Petitioner,

v.

TELCO COMMUNICATIONS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a federal court must abstain under *Younger* from accepting jurisdiction of a constitutional challenge to state laws after administrative charges have been issued under those laws but before adjudication in the state courts.

PARTIES

The only parties to this proceeding are listed in the caption. Petitioner is S. Mason Carbaugh, Commissioner of the Virginia Department of Agriculture and Consumer Services. Respondent is Telco Communications, Inc.

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The opinion of the Fourth Circuit Court of Appeals is reproduced in Petitioner's Appendix at pages 27-61, reported as *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989). The opinion of the trial court on the abstention issue is reproduced at Petitioner's Appendix at pages 19-26. References to the Appendix shall be designated as "(App. ___.)."

JURISDICTION

The judgment of the Fourth Circuit was issued on September 20, 1989. Petitioner filed a timely petition for rehearing on October 3, 1989. On November 9, 1989, the Fourth Circuit denied the petition for rehearing by a 2-1 vote.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Excerpts from the Virginia Administrative Process Act (§ 9.6.14:1 *et seq.* of the Virginia Code) and the Virginia Charitable Solicitation Laws (§ 57-48 *et seq.*) are reproduced at App. 1-10.

STATEMENT OF THE CASE

A. Introduction

The sole issue raised herein is whether the lower courts erred under *Younger v. Harris*, 401 U.S. 37 (1971), in failing to abstain from resolving a corporation's constitutional challenges to state laws while a state regulatory agency was engaged in enforcement actions against that corporation under those laws. To understand the significance of the abstention ruling, it is necessary to appreciate the nature of the enforcement action and the state's interest in preserving the integrity of the process.

B. The Virginia Administrative Process Act

Virginia law provides uniform procedures governing the administrative actions of its regulatory agencies, including both rule-making and enforcement functions, codified as the Virginia Administrative Process Act, § 9-6.14:1 *et seq.* of the Code of Virginia (the "APA"). Article 3 of the APA governs "case decisions" for state agencies in pursuing alleged violations of state law. Under the APA, a state agency may use the informal fact-finding conference authorized by § 9-6.14:11 as a means of adjudicating alleged violations of laws or regulations. If charges are not resolved at that level, the agency may proceed to the more formal hearing contemplated by § 9-6.14:12. For informal conferences under § 9-6.14:11, the parties have a right to reasonable notice, to appear in person or by counsel and to receive notice of information in the possession of the agency upon which an adverse decision can be made. For formal hearings under § 9-6.14:12, the parties have the right to reasonable notice,

representation by counsel, cross examination, oral argument, and other safeguards associated with a formal adjudicatory proceeding. Upon request of a party, the agency must subpoena witnesses. § 9-6.14:13. Formal hearings are conducted by independent hearing officers, who are private attorneys. § 9-6.14:14.1.

Any party aggrieved by a case decision has a right to state court review of the agency action. § 9-6.14:16. The issues to be considered upon state court review include whether the agency action was in accordance with " . . . constitutional right, power, privileges, or immunity . . . " § 9-6.14:17.

C. Virginia's Charitable Solicitation Laws

In 1974, the Commonwealth of Virginia enacted comprehensive legislation regulating the solicitation of charitable contributions by professional solicitors and others (the "solicitation laws"), codified as §§ 57-48 *et seq.* of the Virginia Code. Petitioner S. Mason Carbaugh ("Carbaugh" or "Petitioner"), as Commissioner of the Virginia Department of Agriculture and Consumer Services, has responsibility for enforcement of these laws. He has delegated that responsibility to the Office of Consumer Affairs (now the Division of Consumer Affairs) ("OCA").

The solicitation laws require yearly registration (not licensure) of professional solicitors, who must comply with certain minimum standards as a condition to engaging in solicitation of funds in Virginia. Respondent Telco Communications, Inc. ("Telco") is a professional solicitor engaged in the business of raising funds for police organizations and firefighter unions; it registered under the

solicitation laws with OCA before beginning fundraising in Virginia.

D. OCA Enforcement Actions Against Telco

In March of 1988, following receipt of a complaint that Telco was violating the solicitation laws, OCA informed Telco that it was investigating Telco's activities in Virginia. On June 3, 1988, OCA served specific written charges of violations of the solicitation laws upon Telco's counsel, detailing the nature and dates of the alleged violations and suggesting that an informal fact-finding conference (pursuant to § 9-6.14:11 of the Virginia Code) be scheduled (App. 11-15). OCA's counsel sent a separate letter to Telco's counsel explaining the purpose of the proposed conference (App. 16-17). That letter advised Telco that if the facts determined at the informal conference appeared to justify a suspension or revocation of its registration, a formal hearing would be necessary absent Telco's acceptance of OCA's action.

Telco's president and attorneys agreed to the conference, which was held on July 6, 1988. Following the conference (which did not resolve the charges), OCA continued its enforcement activity by requesting certain records of Telco.

By its counsel's letter dated July 19, 1988, Telco denied OCA's charge, contested the jurisdiction of OCA over it and asserted a First Amendment constitutional challenge to the statutes upon which OCA relied in issuing the charges. Telco filed suit on July 21, 1988, in federal court against Carbaugh, seeking to enjoin OCA's enforcement actions. Carbaugh moved for dismissal under the

Younger abstention doctrine as applicable to administrative proceedings under *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), and *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). The motion was denied and the case was subsequently resolved by the district court's granting summary judgment to Telco on all issues. Petitioner appealed to the Fourth Circuit Court of Appeals, which affirmed the lower court's abstention ruling, while reversing three out of four of the issues concerning the merits of the First Amendment challenge to the solicitation laws.

BASIS FOR FEDERAL JURISDICTION

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Ruling Reflects a Fundamental Misunderstanding of *Younger* Abstention and Threatens the Tenets of Federalism Safeguarded By That Doctrine

A. Introduction

Rule 10.1(a) of this Court gives as one example warranting review on writ of certiorari a decision of a circuit court which

> has so far departed from the accepted and usual course of judicial proceedings, or sanctioned

> such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The decision in *Telco* represents such a departure from the important principles of *Younger* abstention. This departure deserves review and reversal by this Court because of the importance of a correct application of *Younger* abstention to maintain the appropriate delicate balance of state and federal roles fundamental to our system of federalism.

Judge Hall, in dissenting from the Fourth Circuit's ruling below, stated as follows:

> The majority believes this is a First Amendment case. It is not. The majority believes that "we must determine" the constitutionality of several provisions of Virginia's charitable solicitation laws [citation omitted]. We do not. As a matter of comity, we must not. This is an abstention case. It is about federal-state relations in our system of government and a proper respect for the important role of informal procedures in the administrative process.

(App. 49). These comments echo Petitioner's position taken consistently throughout the course of this litigation, a position which is sustained by precedent of this Court and the principles underlying the abstention doctrine.

A federal court must abstain under *Younger* when confronted with a constitutional challenge to a state law to avoid interfering with (1) an ongoing state judicial procedure (2) involving an important state interest where (3) there is an opportunity to raise constitutional challenges. *Middlesex* at 432. There is no contest that the last

two criteria have been met by the APA enforcement proceedings against Telco.[1] The abstention ruling was premised on the erroneous premise that those proceedings do not constitute an ongoing state judicial procedure.

B. Telco's Federal Suit Interrupted An Ongoing State Judicial Proceeding

The majority in *Telco* characterized the informal conference between OCA and Telco convened pursuant to § 9-6.14:11 of the APA as "not remotely" judicial (App. 32). This observation ignores the significance of the informal conference as an integral part of the APA judicial process[2], justifying Younger abstention.

The Virginia legislature, in enacting Article 3 of the APA (titled "Case Decisions"), intended that the informal conference be part of a unitary system of state judicial review of administrative charges brought by regulatory agencies. The official Revisor's Note to § 9-6.14:11 characterizes the informal fact-finding conference as part of the

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[1] It cannot be seriously argued that the enforcement of Virginia's laws governing charitable solicitation is not an important state interest. *See Riley v. National Federation of the Blind of N.C.*, 108 S.Ct. 2667, 2675 (1988). Moreover, § 9-6.14:17 of the APA expressly provides for review by state court of any constitutional claim.

[2] The majority's statement is also technically erroneous. Informal conferences do include some, but not all, of the indicia of a formal judicial process. Specifically, § 9-6.14:11 requires advance notice of the conference and opportunity to be heard by the agency or hearing officer, to be represented by counsel, to be apprised of the facts relied upon by the accuser and to receive a prompt decision by the agency.

"judicial operation" of state agencies in applying state law to particular cases, stating that these conferences

> [a]ccount for by far the greater bulk of administrative operations of a regulatory nature. To exclude them would be to ignore the larger part of the subject. To prevent or seem to prevent them would radically alter, if not impair, an important tool of today's governance. But on the other hand, and for those very reasons, these so-called "informal" agency methods of adjudication should be defined and given substance.

(App. 2). The Revisor's Note further states that

> [w]hile this section is designed as the primary provision respecting case decisions where basic laws do not require an agency hearing, it may also serve, in the discretion of agencies concerned and upon consent of the private parties, as a preliminary or pre-trial method of settling or simplifying cases in which there is a statutory right to a trial-like agency hearing.

(App. 2-3). The clear expression of legislative intent that the informal conference is part of an agency's adjudicatory process, coupled with the trial-like procedural trappings of the conference required by the statute, compel the conclusion that these proceedings are due the deference accorded by the abstention doctrine, contrary to the rulings of the lower courts.[3]

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[3] The importance of the informal conference process is underscored by the fact that the APA does not require formal hearings under § 9-6.14:12 in all instances after an unsuccessful informal conference. *See* § 9-6.14:12(A). ("The *agency shall* afford opportunity for the *formal taking of evidence . . . in any case in which the basic laws provide expressly for decisions upon or*

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In *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 109 S.Ct. 2506 (1989), this Court determined that *Younger* abstention is not required for rate making proceedings which are not part of a unitary and incomplete legislative or judicial process. The Court distinguished the *Dayton* and *Middlesex* cases which involved ongoing proceedings of a judicial nature (and which ultimately provided for state court review). The state process from which Telco extracted itself by filing its federal suit is "judicial," because it involves an inquiry which "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

That the informal conference in which Telco participated before filing suit was not a formal adversary hearing is irrelevant for the purpose of the *Younger* abstention. Both *Middlesex* and *Dayton* make it clear that state administrative hearings are judicial under *Younger* if there is an opportunity for judicial review during the process. This Court's rulings in *Middlesex* and *Dayton* did not turn on whether a full blown judicial hearing had been completed or scheduled at the time federal suit was filed, but

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after hearing and *may do so* in any case *to the extent* that informal conference *procedures under § 9-6.14:11* have not been had or *have failed to dispose of the case by consent.*") (emphasis supplied.) Many agencies rely totally on informal conferences for reaching their case decisions, and the right to judicial review of such decisions attaches at that juncture. *See, e.g. Virginia Alcoholic Beverage Control Comm'n v. York State Inn*, 220 Va. 310, 313, 257 S.E.2d 851, 853 (1979).

whether plaintiff would have the opportunity to raise his constitutional claims in state court as part of that process.

Similarly, the lower courts' conclusion that the APA proceeding against Telco was not "ongoing" at the time Telco filed suit in federal court ignores the significance of the APA procedure as a unitary system (and not a series of separable administrative actions). There was no ongoing proceeding against Telco only in the technical sense that the informal conference had not resolved the charges. Yet OCA had informed Telco by letter prior to the informal conference that, absent a settlement, a formal hearing under the APA further would be scheduled (App. 16-17). Telco filed suit seeking to enjoin further OCA enforcement actions within two days of informing OCA of its decision not to accept a settlement of the charges. Only the intervening filing of the federal suit and the trial court's refusal to abstain avoided further APA procedures.

C. The Lower Courts' Refusal to Abstain Shows Disrespect for the Commonwealth of Virginia as a Sovereign

This Court in *New Orleans Pub. Serv., Inc.* recognized that under *Younger* abstention a federal court should not disrupt the integrity of a state's trial-and-appeals process because it is a unitary system and "by intervening in mid-process would demonstrate a lack of respect for the State as sovereign." 109 S.Ct. 2518. The majority opinion in *Telco* evidences such disrespect. It presumes that Telco cannot receive a meaningful review of its constitutional claims as part of the state judicial review guaranteed by

the APA. One of the principles of federalism recognized by the doctrine of *Younger* abstention is that state courts are just as competent as federal courts to adjudicate federal constitutional issues. As this Court noted in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), *reh'g denied*, 473 U.S. 926 (1985):

> It denigrates the judges who serve the state courts to suggest that they will not enforce the supreme law of the land.

Id. at 238, n. 2. Despite this strong statement, the Fourth Circuit based its decision, in part, upon the observation that without federal intervention in Telco's administrative proceeding "any opportunity for federal adjudication of federal rights will be lost." (App. 34).

Telco undeniably has a right to have its constitutional claims judicially resolved. Under circumstances such as are presented herein, however, *Younger* abstention demands that Telco first exhaust its remedies within the adjudicatory process provided by state law.

D. The Denial of Abstention Threatens the Effectiveness of the Adjudicative Process Under the APA

The *Telco* decision not only fails to respect state sovereignty, it also seriously threatens the effectiveness of the APA process. As pointed out in the Revisor's Note to § 9-6.14:11, the informal fact-finding conference stage of the APA serves the laudable purpose of encouraging quick and efficient resolution of administrative charges.

In allowing Telco to circumvent further APA proceedings by filing a federal suit, the lower courts have sent a

clear message to state agencies: they must schedule formal adversarial hearings under the APA in lieu of the informal conference hearing to avoid federal intervention. That result can only realize the concern expressed in the Revisor's Note that the avoidance of the informal procedures would "radically alter, if not disastrously impair, an important tool of today's governance. . . ." (App. 2). Again, the dissent recognizes this problem with the majority opinion:

> Consequently, to hold that no state enforcement proceeding is ongoing *after* one of these pretrial conferences has been held, makes no sense. Under the majority's reasoning, only if a formal hearing were scheduled would there be an ongoing proceeding. This view completely ignores the continuous nature of administrative proceedings and disregards this "important tool" of Virginia governance.

(App. 54).

Petitioner suggests that, as a result of the *Telco* decision, agencies will avoid the less expensive, quicker informal conference and instead go directly to the formal hearing. The increased costs in time and money will be borne not only by the regulators, but also by those who are regulated. Individuals who might successfully defend themselves in informal conferences will likely retain counsel, for example, to represent them at the formal hearings. Thus, the Fourth Circuit has upset the careful balancing of interests – informality and efficiency versus formality and expense – crafted by the Virginia legislature in the APA.

II. Telco Creates a Conflict Among The Circuits Concerning the Definition of "Ongoing State Proceeding" For Purposes of *Younger* Abstention

The Fourth Circuit's holding that Telco was not engaged in an ongoing state judicial proceeding when it filed suit in federal court cannot be reconciled with the contrary holding of the Second Circuit in *University Club v. City of New York*, 842 F.2d 37 (2nd Cir. 1988). In that case, two private clubs sued a city commission which had begun an investigation of the clubs' alleged discriminatory practices. The suit was filed after the agency had issued charges but before it had scheduled a conciliation meeting. The court found these facts indistinguishable from those in *Dayton* for purposes of *Younger* abstention:

> In both cases the administrative posture was the same: the commissions were proceeding with conciliation efforts and adjudication of the charges, when the targets of the investigation brought suit in federal district court to halt the administrative actions because of alleged infringement of constitutional rights.

Id. at 40. The progress of the proceeding against Telco had extended beyond the conciliation stage; scheduling of a formal APA hearing was imminent when suit was filed.

Although Petitioner cited *University Club* to the Fourth Circuit in support of his appeal, the majority opinion did not address that case. The dissent recognized the obvious conflict, and observed that proceedings in *University Club* had not progressed as far as those in Telco (App. 56).[4]

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[4] The dissent also agreed with Petitioner's argument that the *Telco* ruling conflicts with an earlier opinion of the Fourth

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That there is a conflict between the rulings of the Second and Fourth Circuits is apparent. Rule 10.1(a) of this Court cites such a conflict as an appropriate justification for granting a petition for a writ of certiorari. Petitioner respectfully submits that this conflict provides an independent justification for review in addition to the more compelling reasons stated in Part I of this petition.

CONCLUSION

There are three reasons for the Court's accepting review of this petition for certiorari, any one of which is sufficient by itself. First, the *Telco* opinion creates a conflict among the circuits concerning what constitutes an ongoing state adjudicatory proceeding warranting *Younger* abstention. Secondly, the refusal of the lower courts to abstain despite the fact that administrative charges had been issued but not resolved in the state system is an unwarranted slap at state sovereignty. Thirdly, and most importantly for Petitioner, is the fact that the *Telco* decision threatens to impair one of the most useful means of dispute resolution under the APA – the informal fact-finding conference.

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Circuit in *American Civil Liberties Union v. Bozardt*, 539 F.2d 340 (4th Cir. 1976), *cert. denied*, 429 U.S. 1022 (1976). In *Bozardt*, the court approved federal abstention in a suit challenging a disciplinary bar investigation of an attorney before a formal hearing had been scheduled. *Id.* at 345.

After *Telco*, the only means by which a state agency can assure the continuity and integrity of APA enforcement procedures against federal intervention is to issue charges and immediately schedule a formal adversarial hearing, bypassing the informal conference. The extension of *Younger* to civil administrative hearings is designed to prevent such races to the courthouse, and only a review and reversal by this Court can undo the damage done to the APA process by the *Telco* decision.

Respectfully submitted,

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EXCERPTS FROM THE VIRGINIA ADMINISTRATIVE PROCESS ACT, §§ 9-6.14:1 *et seq.*

§ 9-6.14:3. Policy. – The purpose of this chapter is to supplement present and future basic laws conferring authority on agencies either to make regulations or decide cases as well as to standardize court review thereof save as laws hereafter enacted may otherwise expressly provide. This chapter does not supersede or repeal additional procedural requirements in such basic laws.

Article 3.

Case Decisions.

§ 9-6.14:11. Informal fact finding. – Save to the extent that case decisions are made as provided by § 9-6.14:12, agencies shall, unless the parties consent, ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings. Such conference-consultation procedures include rights of parties to the case (i) to have reasonable notice thereof, (ii) to appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer as provided by subsection A of § 9-6.14:14.1, for the informal presentation of factual data, argument, or proof in connection with any case, (iii) to have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision, (iv) to receive a prompt decision of any application for a license, benefit, or

renewal thereof, and (v) to be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.

REVISOR'S NOTE

Unlike the "legislative" functions hereinbefore dealt with in Article 2, Article 3 is concerned with the "judicial" operations of agencies, that is, the case by case application of law by agencies.

This section, as contrasted with § 9-6.14:12 which follows, deals with adjudications agencies are authorized to make without any of the formalities of trial-like procedure. They account for by far the greater bulk of administrative operations of a regulatory nature. To exclude them would be to ignore the larger part of the subject. To prevent or seem to prevent them would radically alter, if not disastrously impair, an important tool of today's governance. But on the other hand, and for those very reasons, these so-called "informal" agency methods of adjudication should be defined and given substance. Hence this section states the main form such process usually takes, that is, conferences or consultations. To the extent that basic laws permit, agencies may also proceed on the basis of inspections, tests, or elections followed by such conference-consultation procedure as the case issues may require. Initial licensing, for example, is a vital part of state administration and proceeds on the basis of tests or the informal submittal of data designed to show that the applicant meets requirements.

But, while this section is designed as the primary provision respecting case decisions where basic laws do

not require an agency hearing, it may also serve, in the discretion of agencies concerned and upon consent of the private parties as a preliminary or pre-trial method of settling or simplifying cases in which there is a statutory right to a trial-like agency hearing. The latter type of process is governed by § 9-6.14:12 hereinafter, in which detailed evidential and decisional procedure is stated.

The first sentence having defined the subject, the second sentence completes the section by stating requirements for this form of adjudicatory process. Notice of proceedings is obviously necessary; but a distinction should be made in connection with applications for a license, in which case the applicant has the burden of approaching the agency in the first instance as provided in the second paragraph of § 9-6.14:12 hereinafter. Right to appear in person or to have counsel or representation is equally obvious. Prompt decision is particularly desirable in the case of licensing since delay in agency action upon applications amounts to a denial thereof pro tem. However, the heart of the matter relates to the presentation and determination of facts. Where the conference-consultation process is utilized, that means rights to present "factual data, argument, or proof" to the agency or a subordinate designated by the agency to act in its behalf for the purpose; to have notice of any contrary fact basis or information upon which the agency proposes to rely; and to be informed of the factual basis for an adverse decision made by the agency. Such rights of notice or information are, of course, particularly necessary in the case of adverse decisions. Note also that, whether or not private parties appear and submit proofs in such cases, agencies should take care to record in some suitable

fashion the factual basis for their adverse decisions which are not subject to further administrative process under § 9-6.14:12 – because, in case of court review of such otherwise final informal decisions, agencies may be called upon to demonstrate the factual basis upon which they have relied (as explained in the notes to § 9-6.14:17 hereinafter).

§ 9-6.14:12. Litigated issues. – A. The agency shall afford opportunity for the formal taking of evidence upon relevant fact issues in any case in which the basic laws provide expressly for decisions upon or after hearing and may do so in any case to the extent that informal procedures under § 9-6.14:11 have not been had or have failed to dispose of a case by consent.

B. Parties to such formal proceedings shall be given reasonable notice of (i) the time, place, and nature thereof, (ii) the basic law or laws under which the agency contemplates its possible exercise of authority, and (iii) the matters of fact and law asserted or questioned by the agency. Applicants for licenses, rights, benefits, or renewals thereof have the burden of approaching the agency concerned without such prior notice but they shall be similarly informed thereafter in the further course of the proceedings whether pursuant to this section or to § 9-6.14:11.

C. In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made

with dispatch. The burden of proof shall be upon the proponent or applicant. The presiding officers at such proceedings are empowered to (i) administer oaths and affirmations, (ii) receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee an accurate verbatim recording of the evidence, (iii) hold conferences for the settlement or simplification of issues by consent, (iv) dispose of procedural requests, and (v) regulate and expedite the course of the hearing. Where a hearing officer presides, or where a subordinate designated for that purpose presides in hearings specified in subsection E of § 9-6.14:14.1, he shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by such presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion.

D. Prior to the recommendations or decisions of subordinates, the parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefor. In all cases, on request, opportunity shall be afforded for oral argument (i) to hearing officers or subordinate presiding officers, as the case may be, in all cases in which they make such recommendations or decisions or (ii) to the agency in cases in which it makes the original decision without such prior recommendation and otherwise as it may permit in its discretion or provide by general rule. Where hearing officers or subordinate presiding officers, as the case may be, make

recommendations or decisions, the agency shall receive and act on exceptions thereto.

E. All decisions or recommended decisions shall be served upon the parties, become a part of the record, and briefly state or recommend the findings, conclusions, reasons, or basis therefor upon the evidence presented by the record and relevant to the basic law under which the agency is operating together with the appropriate order, license, grant of benefits, sanction, relief, or denial thereof.

REVISOR'S NOTE

A. As distinguished from the prior section, this one deals with fact issues determined by agencies through a trial-like process – but such procedures are required only "where the basic laws provide expressly for decisions upon or after hearing." Note that, when used in a basic law, the word "hearing" in such cases does not have the different meanings met with in Article 2 relating to regulations. Here the word signals only one type of formal fact finding. However, where this form of process is required, the agency may, and often should, first attempt to resolve controversies by consent through the informal methods described in § 9-6.14:11. Conversely, where agencies are not required to use formal trial-like procedures pursuant to this section, they may nevertheless choose to do so for purposes of the record.

B. Here, unlike the general publication of notice usual in connection with the making of regulations under Article 2, notices must be brought to the attention of parties to an adjudication personally. This provision, in

its reference to applicants for licenses, modifies the last sentence of § 9-6.14:11 as mentioned in the note thereto.

C. Subsection C. of this section is a simplified statement of the usual incidents of formal administrative adjudicatory process. It is similar to the listing in the federal Administrative Procedure Act. But one feature may add something to some State practice, that is, the use of subordinates. In addition to presiding at hearings, they may, but only subject to appeal to or review by the agency itself, also either make or recommend findings and a decision as the agency may direct – an obvious necessity if some agencies are to cope with growing case loads and if private parties are to be allowed meaningful contact with personnel upon whom much of the burden rests in any event. See § 9-6.14:4 G and note.

D. Subsection D of this section deals with the so-called post-hearing procedure of administrative agencies. It is designed to bridge the gap between the hearing by a subordinate and the exercise of final decision by the agency, for which purpose provisions such as these are common and borrow heavily from the practice of courts when they delegate fact finding to masters in chancery.

E. The core of any agency adjudication following upon formal procedure is the finding of facts, upon which court review largely depends as indicated in § 9-6.14:17 hereinafter.

§ 9-6.14:13. Subpoenas, depositions and requests for admissions. – The agency or its designated subordinates shall have power to, and on request of any party to a case shall, issue subpoenas requiring testimony or the

production of books, papers, and physical or other evidence. Any person so subpoenaed who objects may, if the agency does not quash or modify the subpoena at his timely request as illegally or improvidently granted, immediately thereupon procure by petition a decision on the validity thereof in the circuit court as provided in § 9-6.14:5; and otherwise in any case of refusal or neglect to comply with an agency subpoena, unless the basic law under which the agency is operating provides some other recourse, enforcement, or penalty, the agency may procure an order of enforcement from such court. Depositions de bene esse and requests for admissions may be directed, issued, and taken on order of the agency for good cause shown; and orders or authorizations therefor may be challenged or enforced in the same manner as subpoenas. Nothing in this section shall be taken to authorize discovery proceedings.

§ 9-6.14:14.1. Hearing officers. – A. In all hearings conducted in accordance with § 9-6.14:12, the hearing shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court and maintained in the Office of Executive Secretary of the Supreme Court. Parties to proceedings conducted pursuant to § 9-6.14:11 may agree at the outset of the proceeding to have a hearing officer preside at the proceeding, such agreement to be revoked only by mutual consent. The Executive Secretary shall have the power to promulgate rules necessary for the administration of the hearing officer system.

All hearing officers shall meet the following minimum standards:

1. Active membership in good standing in the Virginia State Bar;

2. Active practice of law for at least five years;

3. Completion of a course of training approved by the Executive Secretary of the Supreme Court. In order to comply with the demonstrated requirements of the agency requesting a hearing officer, the Executive Secretary may require additional training before a hearing officer will be assigned to a proceeding before that agency.

* * *

§ 9-6.14:16. Right, forms, venue. – Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision, as the same are defined in § 9-6.14:4 of this chapter and whether or not excluded from the procedural requirements of Article 2 (§ 9-6.14:7.1 et seq.) or 3 (§ 9-6.14:11 et seq.) hereof, shall have a right to the direct review thereof by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia. Such actions may be instituted in any court of competent jurisdiction as provided in § 9-6.14:5; and the judgments of such courts of original jurisdictions shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any such regulation or case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action; and the judgment or decree therein shall be appealable as in other cases.

§ 9-6.14:17. Issues on review. – The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (1) accordance with constitutional right, power, privilege, or immunity, (2) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (3) observance of required procedure where any failure therein is not mere harmless error, and (4) the substantially of the evidential support for findings of fact.

* * *

EXCERPT FROM VIRGINIA CHARITABLE SOLICITATION LAWS, §§ 57-48 *et seq.*

§ 57-67. Application to court for relief. – Any person aggrieved by any final order of the Commissioner is entitled to judicial review in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.). Either party may appeal any final order of such court to the Court of Appeals in the same manner as provided by law in cases of appeals of right.

COMMONWEALTH of VIRGINIA

DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES
Office of Consumer Affairs

June 3, 1988

John G. Douglass, Esquire
Wright, Robinson, McCammon,
Osthimer & Tatum
629 E. Main Street
Richmond, Virginia 23219

Peter S. Brooks, Esquire
Goldstein & Manella
265 Franklin Street
Boston, Massachusetts 02110

RE: Telco Communications, Inc.

Dear Mr. Douglass and Mr. Brooks:

After consultation with the attorney representing this Office, I would like to invite you to meet with me to discuss several apparent violations of the Virginia statutes by Telco, and to attempt to agree on a satisfactory solution.

The particular violations of which I am currently aware are these:

1. With reference to the February, 1988 solicitation for the Martinsville-Henry County Fraternal Order of Police ("FOP"):

   A. Telco failed to file with this Office a copy of all sales scripts, particularly any scripts relating to the sale of tickets, in violation of Section 57-61(d).

B. Telco failed to file with this Office amended information relating to the notice of solicitation. More particularly, Telco apparently changed its phone room manager after three days without notifying this Office, in violation of Section 57-61(h); and

C. Telco failed to obtain in advance written commitments from persons willing to accept donated tickets for the handicapped, in violation of Section 57-61(g).

2. With reference to the February, 1988 Falls Church Police Association campaign:

A. In at least some solicitations, Telco failed to inform the public of the name of the employer of the solicitors, and further failed to inform the public that the solicitors were paid, in violation of Section 57-55.2 of the Code.

B. Telco used a script which referred to "our death and disability drive", which, especially in connection with the above failure to inform that the solicitor was a paid employee, was a device or scheme to misrepresent the identity of the solicitor, in violation of Section 57-57(1); and

C. Telco failed to file a final accounting with this Office within ninety days after the completion of the solicitation campaign in violation of Section 57-61(a) of the Code.

3. With reference to the 1988 Portsmouth FOP campaign:

A. At least one of Telco's solicitors employed a device or scheme to defraud by misrepresenting to a potential donor that he was a volunteer,

rather than a paid employee, in violation of Section 57-57(1).

B. In at least one instance, Telco failed to inform the potential donor that the solicitor was paid and failed to inform the potential donor of the name of the employer of the solicitor, in violation of Section 57-55.2; and

C. Telco failed to file a final accounting with this Office within ninety days after the completion of the Solicitation campaign in violation of Section 57-61(a) of the Code.

4. In connection with the April, 1988 Petersburg FOP campaign:

A. Telco used scripts which failed to inform the public of the name of the employer of the solicitor and that the solicitor was in fact paid, in violation of Section 57-55.2 of the Code;

B. Telco failed and has continued to fail to file or provide to my Office a copy of all sales scripts utilized, in that, in particular, no script has been provided which mentions the sale of tickets, in violation of Section 57-61(d):

C. Telco failed to obtain written commitments in advance from persons willing to accept donated tickets for the handicapped, in violation of Section 57-61(g);

D. Telco has failed to file with my Office amended information about the change in the solicitation for the sale of advertisements. More particularly, Telco failed to provide all scripts to my Office which were used, in violation of Section 57-61(h); and

E. Telco failed to provide information to my Office in response to its request, in violation of Section 57-57(m) of the Code. More particularly, this information was requested in person of Telco supervisor Jeff Springer as an agent of the corporation, on or about July 12, and 13, 1988, and requested by phone and again in my letter of April 21, 1988 to Mr. Brooks.

I realize that there may be more than one side to this story. The information which I have so far, however, would justify the suspension or revocation of Telco's registration to solicit charitable contributions in Virginia. I propose that we meet to discuss the appropriateness of a revocation or at least a six month suspension.

I invite Telco to appear with or without you to explain its side of the story and to offer any evidence which it may have. I will indeed give you and Telco every appropriate opportunity to be heard.

Upon appropriate arrangements as to time, you may even review all information in the possession of this Office which we might rely upon in revoking or suspending Telco's registration. Of course I am talking about facts, and not such things as memoranda exchanged between this Office and the Office of the Attorney General.

I suggest that we meet on June 22, 1988 or June 23, 1988 at 11:00 a.m. in my Office. To confirm the date and time, or to arrange a different time if necessary, or to arrange to review any facts in the possession of this Office, please call me at (804) 786-1343.

I do hope you will accept this invitation to appear and participate in this informal fact finding conference.

Sincerely,

Larry Roberts
Coordinator
Charitable Solicitation Section
Office of Consumer Affairs

LR/kak

COMMONWEALTH of VIRGINIA

Office of the Attorney General
June 3, 1988

John G. Douglass, Esquire
Wright, Robinson, McCammon,
Osthimer & Tatum
629 E. Main Street
Richmond, Virginia 23219-2412

Peter S. Brooks, Esquire
Goldstein & Manella
265 Franklin Street
Boston, Massachusetts 02110

Re: Telco Communications, Inc.

Gentlemen:

The Office of Consumer Affairs and my Office are ready to meet with you, as reflected in the enclosed correspondence from Larry Roberts to you. I asked Larry to put together this letter detailing the problems with Telco to give you that notice which you requested.

Informal fact finding conferences such as that proposed by Mr. Roberts are designed to identify issues, agree on facts, if possible, and to reach some agreement on the appropriate disposition of the concerns of the Office of Consumer Affairs. Any final resolution of the matter can occur in connection with an informal fact finding conference only with Telco's agreement. In other words, if the facts appear to justify a suspension or revocation, that can occur as a result of the informal fact finding conference only if Telco agrees. If Telco does not agree, then, absent some emergency situation, a formal

hearing would be necessary to proceed further to a suspension or revocation.

If Telco and you would like to meet, please call Mr. Roberts at 786-1343, as I will be out of town for most of the next week.

Very truly yours,

/s/ Edward P. Nolde
Edward P. Nolde
Assistant Attorney General

2:37/268
Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TELCO COMMUNICATIONS, INC., Plaintiff,	)	Civil Action
v.	)	No.
	)	88-0471-R
S. MASON CARBAUGH, as he is Commissioner of the Department of Agriculture and Consumer Services of the Commonwealth of Virginia, Defendant.	)	

ORDER

For the reasons stated in the accompanying Memorandum and deeming it proper so to do, it is ADJUDGED and ORDERED that Defendant's motion for summary judgment pursuant to Fed.R.Civ.P. 56 be, and the same is hereby DENIED.

Let the Clerk send a copy of this Order and the Memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 13 OCT 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TELCO COMMUNICATIONS, INC., Plaintiff,	)	Civil Action No. 88-0471-R
v.	)	
S. MASON CARBAUGH, as he is Commissioner of the Department of Agriculture and Consumer Services of the Commonwealth of Virginia, Defendant.	)	

MEMORANDUM

This matter is before the Court on defendant's motion for summary judgment pursuant to Fed.R.Civ.P. 56. The parties have waived oral argument, but the issues have been fully briefed and the matter is ripe for disposition. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1343, and the doctrine of pendent jurisdiction.

Given the issues raised in defendant's papers, the Court finds that the motion should have been framed as a motion to dismiss, and the Court treats it as such. For the reasons stated below, defendant's motion will be denied.

The present pleadings and briefs reflect the following: Plaintiff, Telco Communications, Inc. ("Telco"), is a Rhode Island corporation engaged in the business of providing fundraising services to charitable organizations and labor unions for a fee. Telco also publishes handbooks on topics relating to public health and safety. Telco has contracted with local police fraternal organizations in the Commonwealth of Virginia to publish and distribute a pamphlet on their behalf and to solicit advertisements to appear in the publication.

In March, 1988, the Charitable Solicitation Section of the Virginia Office of Consumer Affairs (a division of the Virginia Department of Agriculture and Consumer Services) began an investigation of Telco in response to a complaint that Telco was engaged in telephone solicitation activities in Petersburg, Virginia, in violation of Chapter 5 of Title 57 of the Virginia Code regulating the conduct of professional solicitors. On June 3, 1988, Larry Roberts, Coordinator of the Charitable Solicitation Section, sent a letter to Telco's attorneys detailing "apparent violations" of the Code that appeared to warrant revocation or suspension of Telco's registration to solicit charitable contributions in Virginia. The letter went on to suggest that Telco meet with Roberts on June 22, 1988, "to participate in [an] informal fact finding conference."

The meeting took place on July 6, 1988. At that meeting Telco asserted that its activities on behalf of the fraternal orders of police and fire fighters were not charitable solicitations within the meaning of the Virginia Code, and thus Telco was not subject to the Code's requirements. Telco also asserted that sections of the solicitation law requiring the filing of telephone scripts and the disclosure of certain information during the solicitation are unconstitutional in light of the Supreme Court's ruling in *Riley v. National Federation of the Blind of North Carolina, Inc.*, ___U.S.___, 108 S. Ct. 2667 (1988). According to the defendant, no agreement was reached at the meeting concerning the suspension or revocation of Telco's registration.

On July 21, 1988, Telco filed suit in this Court seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. In its complaint, Telco seeks a declaration that

certain sections of Virginia's charitable solicitation law violate the first and fourteenth amendments to the U.S. Constitution, and asks this Court to enjoin the Office of Consumer Affairs from enforcing these provisions of the Code. In addition, Telco seeks a declaration that its past activities in Virginia are not subject to regulation under Title 57.

Prior to Telco's commencement of the instant action, the Officer of Consumer Affairs had not initiated a formal hearing in conformance with the state Administrative Process Act, Va. Code § 9-6.14:1 *et seq.* ("APA"), to revoke or suspend Telco's registration. Since the filing of this suit, the state has taken no administrative action on the matter.

Instead, the defendant filed a motion requesting that the Court abstain from exercising jurisdiction over the case. The defendant argues that there is a pending state administrative proceeding that will provide the plaintiff with an opportunity to present its constitutional claims and that there is a realistic possibility that Telco's constitutional challenge will be rendered moot by a state determination that its activities do not fall within the Virginia Code's definition of charitable solicitation. This memorandum addresses each of these arguments in turn.

Discussion

Defendant first argues that the Court should abstain from adjudicating the case under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. In *Younger* the Supreme

Court held that a federal court should not enjoin a pending state criminal proceeding except in the unusual situation that an injunction is necessary to prevent great and immediate irreparable injury. The Court justified its holding on the principle that courts of equity should not interfere with criminal prosecutions, and on the "more vital consideration[s]" of comity and federalism. *Id.* at 44. Since 1971, the Court has concluded that the concerns espoused in *Younger* are equally applicable to pending civil proceedings, *see, e.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and to pending state administrative proceedings, *see, e.g., Middlesex County Ethics Committee v. Garden State Bar Assn.*, 457 U.S. 423 (1982); *Ohio Civil Rights Comm'v v. Dayton Schools*, 477 U.S. 619 (1986). The law does not require, however, that a federal court abstain when there are no pending state proceedings. *See Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978).

For cases such as the instant one, involving state administrative proceedings, the Supreme Court has set out a three-part analysis to determine whether abstention is appropriate. *See Middlesex County*, 457 U.S. at 432. The first, and most obvious requirement is that there be a pending state proceeding that is judicial in nature to which the court can defer.[1] Because the Court finds that this first requirement is not met, *Younger* abstention in this case is wholly inappropriate. There simply is no pending state administrative proceeding to which the Court can or should defer.

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[1] The remaining issues are whether the proceedings implicate an important state interest and whether they present an adequate opportunity to raise constitutional challenges.

In response to a request for clarification from the Court, the defendant stated that after the informal conference between the parties on July 6, 1988, "the next step would have been for the Office of Consumer Affairs to serve notice upon Telco for a formal administrative hearing under the APA. . . . At that point, Telco filed suit and defendant did not initiate any formal administrative hearing because of that filing. *The defendant has not taken any further action to initiate a formal hearing and has no present plans to do so until this litigation has been completed.*" (Defendant's Response to Court Order at 2) (emphasis added). In essence, the defendant asks the Court to defer to a state proceeding, while at the same time refusing to initiate a state proceeding to which the Court can properly defer. While the state administrative proceedings should be given due deference, this Court will not delay a justicable issue simply because the state chose not to proceed with a formal administrative hearing. The Court, though sympathetic to the doctrine of abstention, will not stand idly by while litigants properly invoking this Court's jurisdiction await a bureaucratic decision as to whether their issue will or will not be administratively handled.

Defendant argues that the informal conference held on July 6, 1988, constituted the commencement of an administrative proceeding to suspend or revoke Telco's registration to operate as a professional solicitor of charitable contributions in Virginia. Thus, an administrative proceeding was ongoing at the time Telco filed its action in federal court.

This argument is contradicted by both the facts and the applicable law. The acknowledged purposes of the

meeting that took place on July 6, 1988, was to resolve the issue of Telco's alleged violations by consent. The meeting was a settlement conference, not a judicial proceeding that would warrant federal court deference. Nor did the conference signal the commencement of an ongoing administrative proceeding. The State may or may not choose to follow up an informal conference with the institution of formal proceedings. *See* Va. Code § 9-6.14:12. The fact that an informal conference has been held is not indicative of whether administrative proceedings will continue.

Further, even a brief comparison with other cases in which federal courts have deferred to pending state administrative proceedings reveals that the mere convening of an informal settlement conference without more does not constitute the initiation of judicial proceedings for *Younger* abstention purposes. *See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (state commission had initiated administrative proceedings against plaintiff by filing a complaint); *Middlesex Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (disciplinary committee has served a formal statement of charges on plaintiff); *Brach's Meat Market, Inc. v. Abrams*, 668 F.Supp. 275 (S.D.N.Y. 1987) (State Department of Agriculture had assessed fines against plaintiff and then commenced as action in state court for violation of labeling requirements); *Crazy Eddie, Inc. v. Cotter*, 666 F. Supp. 503 (S.D.N.Y. 1987) (state attorney general issued notice of proposed action against plaintiff and then filed suit in state court to enjoin activities of plaintiff). Thus, the defendant's first argument is without merit.

Defendant's second argument is that the Court should abstain from adjudicating the case under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). In *Pullman*, the Supreme Court held that a federal court may abstain from deciding a case in which the state court's resolution of unsettled questions of state law would moot the need for deciding the federal issues.

The defendant argues that in this case, "a determination in the state administrative proceedings that Telco's activities do not fall within the definition of 'charitable solicitation' as defined by Virginia statutes would moot Telco's challenge to the constitutionality of those statutes." (Defendant's Memorandum at 7). What the defendant overlooks, however, is that Telco seeks a determination of the constitutionality of the charitable solicitation laws as applied to future charitable solicitations. Telco claims that its future charitable solicitation activities in Virginia are chilled by the existence of the Virginia statute. Thus, even if the state procceedings determined that Telco's past activities were not charitable solicitation, such a determination would have no effect on the present federal challenge.

Further, even if the state proceedings were to determine that Telco's activities constituted charitable solicitation and Telco had an opportunity to challenge the constitutionality of the law, abstention is still not appropriate. *Pullman* abstention is not used merely to give a state court the opportunity to hold that a statute violates the federal Constitution. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). As recently stated by the Eleventh Circuit Court of Appeals, "[i]f the state proceeding will merely apply federal constitutional law, then the

state construction will *not* moot or modify the constitutional question." *Duke v. James*, 713 F.2d 1506, 1510 (11th Cir. 1983). Thus, the *Pullman* doctrine simply does not apply.

Conclusion

For the reasons stated, the Court will deny defendant's motion for summary judgment.

An appropriate Order shall issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 13 OCT 1988

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2668

TELCO COMMUNICATIONS, INC.,

Plaintiff – Appellee,

versus

S. MASON CARBAUGH, as he is Commissioner of the Department of Agriculture and Consumer Services of the Commonwealth of Virginia,

Defendant – Appellant,

STATE OF CONNECTICUT; STATE OF MARYLAND; STATE OF NORTH CAROLINA; STATE OF WEST VIRGINIA

Amici Curiae,

VIRGINIA STATE LODGE, FRATERNAL ORDER OF POLICE,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (CA-88-471-R).

Argued: May 11, 1989 Decided: September 20, 1989

Before HALL and WILKINSON, Circuit Judges, and WILLIAMS, Senior United States District Judge for the Western District of Virginia, sitting by designation.

WILKINSON, Circuit Judge:

In this case we must determine if four provisions of the Virginia charitable solicitation laws, Va. Code Ann. §§ 57-48 *et seq.*, are constitutional. The first provision states that a professional solicitor must disclose to potential donors the percentage amount of a contribution that will go to the charitable organization for its own use. Va. Code Ann. § 57-55.1. The second requires professional solicitors to disclose in writing to potential donors that their financial statements for the last fiscal year are available from the Virginia Office of Consumer Affairs. *Id.* at § 57-55.2. The third provision mandates that a solicitor file with the Office of Consumer Affairs a copy of the script of any oral solicitation at least ten days prior to the commencement of the solicitation campaign. *Id.* at § 57-61D. Finally, § 57-61.1B of the Virginia Code permits the Commissioner of the Officer of Consumer Services to suspend or revoke the registration of a solicitor if certain provisions of the Act are violated.

The district court held that each of the four challenged provisions impermissibly infringed on First Amendment freedoms. *Telco Communications, Inc. v. Carbaugh*, 700 F. Supp. 294 (E.D. Va. 1988). We find Telco's challenge to the percentage disclosure requirement to be moot. We likewise find the challenge to the suspension and revocation provisions in § 57-61.B non-justiciable. We affirm the district court with respect to the prior submission of solicitation scripts. We reverse, however, with regard to the required disclosure of financial statements on file with the state.

I.

Plaintiff Telco Communications, Inc. is engaged in the business of providing fund raising services to police organizations and fire fighter unions. Plaintiff publishes a series of handbooks relating to public health and safety. Topics for the handbooks have included drug and alcohol abuse awareness and crime prevention. The client on whose behalf Telco conducts a fund raising campaign receives a percentage of the gross advertising revenue of these handbooks, and Telco is responsible for the preparation, printing, and distribution of the handbooks. Plaintiff contracted with local police fraternal organizations in the Commonwealth of Virginia to publish and distribute a pamphlet on their behalf and to solicit advertisements for the publication.

Following a complaint that Telco had violated Virginia solicitation laws, the Virginia Office of Consumer Affairs (OCA) advised plaintiff in March 1988, that it was investigating plaintiff's fund raising activities in Virginia. Thereafter, on June 3, 1988, OCA informed plaintiff's attorneys of the specific violations which Telco had allegedly committed and invited plaintiff to an informal fact-finding conference. The conference was held on July 6, 1988. No resolution of the charges was reached, however, and OCA continued its investigation.

On July 21, 1988, Telco filed suit in the Eastern District of Virginia seeking to enjoin the OCA from enforcing certain provisions of the Virginia charitable solicitation laws. Count I of the complaint alleged that four provisions of the Virginia charitable solicitation laws, *see* Va. Code Ann. §§ 57-55.1; 57-55.2; 57-61D; 57-61.1B and C,

infringed on Telco's rights to free speech, in violation of the First and Fourteenth Amendments. Count II was a pendent state claim alleging that the charitable solicitation provisions at issue did not apply to plaintiff's operations.

Through a motion for summary judgment, defendant Mason Carbaugh, Commissioner of the Department of Agriculture and Consumer Services of the Commonwealth of Virginia, requested the district court to abstain from exercising jurisdiction because of the ongoing state administrative proceedings against Telco. The district court denied defendant's motion.

On September 26, 1988, plaintiff moved for partial summary judgment on Count I of its complaint. Defendant cross-moved for partial summary judgment. After oral argument the district court granted summary judgment in Telco's favor on all issued raised in Count I. *Telco Communications, Inc. v. Carbaugh,* 700 F.Supp. 294 (E.D. Va. 1988). Plaintiff then stipulated to a dismissal without prejudice of Count II.

Defendant appeals.

II.

The Commonwealth contends the district court should have abstained from hearing Telco's constitutional claims. It asserts that administrative proceedings had been instituted against Telco on June 3, 1988, by a letter to Telco's attorneys specifying violations of state law and inviting them to attend a fact-finding conference. Since such procedures were still pending when Telco filed suit

on July 21, 1988, it argues that abstention was proper. *Younger v. Harris*, 401 U.S. 37 (1971). We hold, however, that the district court did not err in declining to abstain where state proceedings were in a preliminary stage and where the state had imposed a prior restraint upon protected speech.

Abstention is the exception, "not the rule." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976); *Cox v. Planning Dist. I Community Mental Health and Mental Retardation Services Bd.*, 669 F.2d 940, 942 (4th Cir. 1982). Under *Younger v. Harris*, 401 U.S. 37 (1971), federal courts should abstain "whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237-38 (1984); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432-37 (1982). Important to *Younger* abstention is the existence of an ongoing state proceeding. If such a proceeding exists, "reinstituting the action in the federal courts" is impermissible; indeed to do so would involve a loss of time and duplication of effort. *Wulp v. Corcoran*, 454 F.2d 826, 831 (1st Cir. 1972). If no state proceeding is pending, however, a federal action may be permissible because it guarantees a party which has violated state law "a chance for ultimate vindication of constitutional claims." *Id.* If the ongoing state proceeding is "judicial in nature," *Younger* abstention plainly applies. *Middlesex*, 457 U.S. at 433-34. Administrative proceedings are not judicial in nature, however, if state law expressly indicates that the proceeding is not a judicial proceeding or part of one, *Midkiff*, 467 U.S. at 238-39, or if the proceeding lacks trial-like trappings.

Here Telco's action did not disrupt any ongoing state proceeding. Upon learning that the OCA was investigating its activities in Virginia, Telco requested a meeting with OCA. After several months, an "informal fact-finding conference" was held on July 6, 1988. The OCA, however, never initiated a formal hearing in conformance with the Commonwealth's Administrative Process Act, Va. Code Ann. § 9-6.14:1 *et seq.* Nor did the OCA request a formal prosecution against Telco. An informal conference need not be followed by the institution of formal proceedings. *See* Va. Code Ann. § 9-6.14:12. As such, it is not indicative of whether administrative proceedings will continue. While Telco's filing of the federal action on July 21, 1988, may or may not have led the state to refrain from filing formal charges, that in no way diminishes the uncertain prospects that plaintiff was facing. Indeed, after learning of the investigation of its activities, Telco had to wait months before any meaningful response to its request for a meeting with state officials was received.

Likewise, the July 6 meeting with those officials was not remotely "judicial in nature." Only Telco, the OCA, and their respective counsel participated at the meeting. The participants were not sworn nor was a record maintained. No opportunity was provided to examine or cross-examine. The meeting was simply a settlement conference to see if the dispute could be consensually resolved. The Virginia Administrative Process Act carefully distinguishes between informal and formal proceedings. Only at the latter are the safeguards of subpoenas of witnesses, cross-examination, and an impartial hearing officer provided. *See* Va. Code Ann. §§ 9-6.14:12; 9-6.14:13; 9-6.14:14.1.

Recent cases applying *Younger* abstention support this conclusion. In each of them, the court abstained from exercising jurisdiction because of the existence of formal, ongoing state proceedings. In *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986), for example, the Supreme Court found abstention proper because the subject of an administrative complaint brought suit in federal court after the Ohio Civil rights Commission had initiated formal administrative proceedings. In *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1983), the Court abstained where it found an attorney, prior to the commencement of the federal action, had received a formal statement of charges from the ethics committee and was required to file an answer within ten days. This circuit, in *Simopoulos v. Virginia State Board of Medicine*, 644 F.2d 321 (4th Cir. 1981), moreover, found abstention appropriate because a state criminal proceeding was underway before the plaintiff initiated his federal action. Finally, in *American Civil Liberties Union v. Bozardt*, 539 F.2d 340 (4th Cir. 1976), the court did not entertain jurisdiction because a bar disciplinary complaint had been filed.

Younger abstention represents an accommodation between a state's pursuit of important interests in its own forum and the federal interest in federal adjudication of federal rights. We decline to hold that *Younger* abstention is required whenever a state bureaucracy has initiated contact with a putative federal plaintiff. Where no formal enforcement action has been undertaken, any disruption of state process will be slight. While important state interests are present in connection with this or any state statute, the strength of those interests will be respected

by any court assessing a plaintiff's constitutional claims. Appellant's contention – that abstention is required whenever enforcement is threatened – would leave a party's constitutional rights in limbo while an agency contemplates enforcement but does not undertake it. *Wulp*, 454 F.2d at 831. A federal plaintiff would be placed "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [it] believes to be constitutionally protected activity in order to avoid becoming enmeshed" in enforcement proceedings. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). The prospect of such prolonged uncertainty cannot but chill a party's First Amendment freedoms. *See Zwickler v. Koota*, 389 U.S. 241, 252 (1967). *See also Houston v. Hill*, 482 U.S. 451, 467 (1987) (Court "particularly reluctant to abstain in cases involving facial challenges based on the First Amendment"). We hold, therefore, that the period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its First Amendment challenges in federal court. Indeed, if this time is never appropriate, any opportunity for federal adjudication of federal rights will be lost.[1]

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[1] While there may be some theoretical concern that a state would prematurely institute formal enforcement proceedings in order to retain state jurisdiction, this danger has always been inherent in *Younger*'s requirement of abstention in the face of an ongoing state proceeding. The natural advantages to both parties of amicable settlements, however, operates as a disincentive both to federal suits and to premature formal enforcement on the part of the state.

If, however, one is disposed to posit dangers from the timing of *Younger* abstention, then the danger of requiring abstention at the onset of informal contacts is that plaintiffs may rush to federal court before seeking to settle a case.

It is this last point that underscores our disagreement with the dissenting opinion which steadfastly insists that this is not a First Amendment case. The dissenting opinion holds that *Younger* abstention is flatly compelled whenever the administrative process is even preliminarily underway. No matter how egregious the state's infringement of constitutional rights or how incipient the stage of administrative proceedings, the dissent would mandate abstention. This converts a doctrine of comity into a blanket permission for the prolonged commission of unconstitutional acts. It would allow any state agency to persist in conduct that is patently unconstitutional. In this case, as we shall show in section IIIC, *infra*, the state agency was engaged in a prior restraint of protected speech. The dissent, in its insistence upon *Younger* abstention, offers no defense of the state's practice; nor is there one. Absent from the dissenting opinion is an appreciation for the role of federal courts in protecting from plain constitutional infringement the rights and liberties of citizens who properly invoke their jurisdiction. *Younger* itself recognized a role for the court in such cases. The doctrine has always involved some interplay between concepts of comity and the need for protection of constitutional rights. *Younger*, 401 U.S. at 44.

We do not hold as a general matter that district courts are justified in entertaining jurisdiction simply because state proceedings have not reached a more formal stage. The doctrine of *Younger* abstention has progressed over the past two decades to protect state criminal proceedings, *Younger*, 401 U.S. 37, state civil cases, *Juidice v. Vail*, 430 U.S. 327 (1977), and state

administrative process, *Dayton*, 477 U.S. 619 (1986), from premature federal interference. To follow the doctrine, however, as one would a pied piper, is to forsake the Supreme Court's rulings on constitutional rights. We hold that the district court did not err in entertaining jurisdiction in the facts of the clear constitutional violation in this case.

III.

"[C]haritable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959 (1984). *See also Riley v. National Federation of the Blind of N.C.*, 108 S. Ct. 2672-73 (1988). Charitable solicitations inform the public about the charity's existence and goals. A donor's contribution in response "to a request for funds functions as a general expression of support" for the charity and its purposes. *Cornelius v. NAACP Legal Defense and Educational Fund*, 472 U.S. 788, 799 (1985). First Amendment protections extend as well to the paid professional solicitor: "A speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley*, 108 S. Ct. at 2680. While "soliciting financial support is undoubtedly subject to reasonable regulation," *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980), such regulation must not unduly intrude upon the rights of free speech. *Id.* at 637. That is, the state bears the burden of showing that its regulation is narrowly tailored to further a strong, subordinating interest that the state is entitled to protect. *Munson*, 467 U.S. at 960-61; *Village of Schaumburg*, 444 U.S. at 637.

The district court held that the four challenged provisions of the Virginia charitable solicitation laws impermissibly infringed on Telco's First Amendment rights. We address the challenged provisions in turn.

A.

Section 57-55.1 of the Virginia Code provides that a professional solicitor must disclose to potential donors the percentage of their contribution which will be received by the charitable organization for its own use:

> It shall be a violation of this chapter for a professional solicitor to solicit contributions from a potential donor in this Commonwealth without clearly and conspicuousl disclosing to the potential donor prior to orally requesting a contribution, or contemporaneously with a written request for a contribution, at the point of solicitation, the minimum percentage of any amount contributed which will be received by the charitable or civic organization for its own use.

Telco's challenge to the constitutionality of this section is moot.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *Commonwealth of Virginia v. Califano*, 631 F.2d 324, 326 (4th Cir. 1980). Generally, the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Jurisdiction, however, may abate if there is no reasonable expectation that the alleged violation will recur and "interim

events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Califano*, 631 F.2d at 326.

Here no reasonable expectation exists that Virginia will seek to enforce the statute. Subsequent to *Riley v. National Federation of the Blind of N.C.*, 108 S. Ct. 2667 (1988), where the Supreme Court struck down a North Carolina statute similar to § 57-55.1, the OCA has not threatened Telco or any other professional solicitor with any action for violation of § 57-55.1. OCA, moreover, has not asserted its right to enforce § 57-55.1 at any future time. In effect, OCA has conceded the unconstitutionality of the statute. While Telco points to a July 14, 1988, letter from the Attorney General as an indication that *Riley* will not affect the OCA's § 57-55.1 charges, that letter noted only that *Riley* will not affect the charges in the June 3, 1988 letter – a letter which omitted any mention of § 57-55.1. The only OCA letters mentioning § 57-55.1 were sent in March, 1988, prior to the Supreme Court's *Riley* decision.

We believe that respect for the role of the states and for the limits of the federal adjudicative function to live cases and controversies counsels against the issuance of unnecessary injunctions against state officials. "To slap injunctions on state officials who have never violated the law or shown any intention to violate the law would exceed the proper bounds of equitable discretion." *Bloodgood v. Garraghty*, 783 F.2d 470, 476 (4th Cir. 1986). State officials have shown no inclination to enforce this statute since *Riley* and we decline to indulge any presumption with respect to their conduct other than one of good faith.

B.

Virginia Code § 57-55.2 requires professional solicitors to disclose in writing that financial statements for the last fiscal year are available from the Virginia Office of Consumer Affairs. It provides:

> Every professional solicitor who solicits contributions from a prospective contributor in this Commonwealth: . . . (iii) shall further disclose, in writing, the fact that a financial statement for the last fiscal year is available from the State Office of Consumer Affairs.

The OCA argues that this section promotes the Commonwealth's interest in public education regarding charitable organizations and prevents fraud and harassment. It contends also that the requirement is narrowly tailored to further such interests. We agree.

Informing the public, *see Village of Schaumburg*, 444 U.S. at 637-38; *International Society for Krishna Consciousness v. City of Houston, Texas*, 689 F.2d 541, 547-48 (5th Cir. 1982), and preventing fraud, *see Riley*, 108 S.Ct. at 2676; *Village of Schaumburg*, 444 U.S. at 636-37, are substantial state interests, both fostered by § 57-55.2. While there are distinct limits on the extent to which private entities may be enlisted by the state in this educative function, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the state interest in adding to the public knowledge of professional solicitations is not one that is inherently incompatible with the First Amendment. The requirement of § 57-55.2 educates the public generally about the availability of financial information on solicitors. It informs a donor that information on the soliciting entity is available from the OCA, and that, by implication, information

about other solicitors is also available. The information contained in the financial statements, moreover, is invaluable. A donor can use this information to determine if a particular solicitation is bona fide by ascertaining whether the solicitor is registered. A donor might also use this information to learn further about a solicitor's operations. Additionally, this section assists in preventing fraud. When comparative information is available, inaccuracies in inducements are less likely to occur. If they do occur, they are more likely to be discovered.

Section 57-55.2, moreover, is narrowly tailored. The statute requires that the disclosure be made in writing to prospective contributors. With respect to written solicitations, a brief notation of this nature is not a burdensome requirement. With respect to oral solicitations, such as those conducted by Telco, the requirement of a written disclosure can be easily met through notation on the donor's receipt. Because the donation will have already been made in such a case, the disclosure will discourage donations only if donors read that financial statements are available and then stop payment on their checks – an unlikely event. Finally, while Telco suggests the state could accomplish its purposes by publishing the information itself, the requirement that the disclosure be made to charitable contributors is tailored to that group which would most desire the information and make an informed decision on the basis of it.

In *Meese v. Keene*, 481 U.S. 465 (1987), a member of the California State Senate challenged as unconstitutional the Foreign Agents Registration Act, 22 U.S.C. §§ 611 *et seq.*, which required several Canadian documentary films to

carry the label "political propaganda" along with a standard form disclosure about the availability from the government of reports about the films. The Court upheld both the "political propaganda" label and the standard form disclosures, noting that "[d]isseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials." *Id.* at 481. While the dissent objected to use of the label "political propaganda," it did not object to the standard form disclosure, and even argued that this truly neutral instruction was a sufficient alternative to the objectionable term. *Id.* at 494 (Blackmun, J., dissenting). Section 57-55.2 simply requires a similar, neutral disclosure about the availability of reports from the government. It affords "more speech" to the public, but does not silence the solicitor. *See generally, Id.* at 481, *quoting Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Riley is also instructive. Unlike the compelled disclosure of the percentage collected that will go to a charity struck down in *Riley*, the brief, bland, and nonpejorative disclosure required here is unlikely to discourage donations. Moreover, unlike the percentage donation requirement which the *Riley* Court indicated might have an unequal effect upon campaigns "with high costs and expenses," 108 S. Ct. at 2679, Va. Code Ann. § 57-55.2 is a boilerplate requirement which will affect all solicitors equally. Finally, the *Riley* Court explicitly approved a requirement that a solicitor disclose to potential donor. his professional status, including his employer's name and address, a neutral requirement similar to § 57-55.2. 108 S. Ct. at 2679 n.11.

Telco's receipt stated the following: "A financial statement can be obtained by contacting the Office of Consumer Affairs Division in Richmond." Requiring such a statement is a permissible exercise of state authority, and we reverse the judgment of the district court to the contrary.

C.

Section 57-61D requires solicitors to submit the script of an oral solicitation to the Commissioner at least ten days prior to the commencement of solicitation. It provides that:

> At least ten days prior to the commencement of each solicitation campaign, the solicitor shall file with the Commissioner a copy of the contract entered into with any charitable or civic organization and shall file a completed 'Solicitation Notice' on forms prescribed by the Commissioner. . . .Copies of all campaign solicitation literature, including the text of any solicitation to be made orally, shall be attached to the Solicitation Notice. The charitable or civic organization on whose behalf the solicitor is acting shall certify that the Solicitation Notice and accompanying materials are true and complete.

The OCA contends that this section promotes the state's interest in the prevention of fraud and misrepresentation in solicitation. Moreover, OCA argues that this requirement is the only effective regulation of telephone solicitation and is not unduly burdensome. We, however, find § 57-61D an unconstitutional prior restraint.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First

Amendment rights." *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1976). A threat of criminal or civil sanctions chills speech, but a "prior restraint 'freezes' it at least for the time." *Id., quoting* A. Bickel, The Morality of Consent 61 (1975). Any system of prior restraints of expression thus bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

The Commonwealth fails to carry this "heavy burden." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Although the Commonwealth has a legitimate interest in preventing fraud and misrepresentation, there is a thin line between reviewing a script for misrepresentations and reviewing it for content. Section 57-61D provides no guidelines for OCA review and thus permits OCA officials to recast solicitation scripts so as to reflect their judgment as to how a solicitation can be made. Without guidelines, unpopular or controversial organizations may be subject to stricter scrutiny. Moreover, the requirement might dissuade some organizations from soliciting in Virginia, *see Riley*, 108 S. Ct. at 2676, and discourage others from submitting scripts which, although accurate, may risk the displeasure of state officials.

While § 57-61D may be the most effective means of monitoring telephone solicitation, "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 108 S. Ct. at 2676; *Village of Schaumburg*, 444 U.S. at 639; *Schneider v. State*, 308 U.S. 147, 164 (1939). Potential donors may be protected against fraud and misrepresentation by vigorous enforcement of the Commonwealth's anti-fraud and misrepresentation statutes.

Riley, 108 S. Ct. at 2676. Notification that a fundraiser's financial statements are available, as required by § 57-55.2, will facilitate the Commonwealth's enforcement of these provisions by ensuring that donors are aware of and have the opportunity to use comparative information. Such enforcement "punish[es] the few who abuse rights of speech *after* they break the law" rather than "throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).

Appellant contends that the practical application of this section is not burdensome: that the Commissioner does not review the script for content but only checks for potential misrepresentations; that the Commissioner relies only on his powers of persuasion to get a solicitor to alter a possible misrepresentation; that the Commissioner tolerates deviations from the script; that the Commissioner does not absolutely require a script (but only an outline), and that the maximum period of approval for scripts is ten days and is often much shorter.

None of these assurances, however, persuades us that bureaucratic review of solicitation scripts is not rife with the potential for abuse. The Commissioner's power to suspend or revoke a license under § 57-61.1B provides him substantial leverage over charitable solicitations. While the OCA may only "request" script alterations before approval is given to begin solicitations, the practical effect of such a "request" is likely to go beyond persuasion. In fact, the record suggests a solicitor has never refused such a request. Scripts, moreover, are required. A "solicitation notice" must be filed with the OCA, and a copy of all solicitation literature and the text

of any solicitation to be made orally must be attached to the solicitation notice. Va. Code Ann. § 57-61D. Finally, an OCA representative testified that a script is required and if none exists, the solicitor must reduce to writing the proposed set presentation. Monitoring devices, such as that in Va. Code Ann. § 57-61D, are a powerful inducement toward orthodox presentation of charitable solicitations –a result which the variety in character of charitable organizations belies and which the commitment to diverse expression in the First Amendment forbids.

Appellant's reliance on *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961), is misplaced. Although *Times Film* upheld an ordinance requiring the prior submission of motion pictures to a censorship board, the Supreme Court substantially modified this decision so as to permit the prior submission of motion pictures only if there are adequate procedural safeguards, which are conspicuously absent here. *Freedman v. Maryland*, 380 U.S. 51 (1965).

Appellant also relies on *Shapero v. Kentucky Bar Association*, 108 S. Ct. 1916 (1988), which permits states to require lawyers to file a copy of solicitation letters with a state agency. *Shapero*, however, has no application to restrictions on charitable solicitations. Unlike charitable solicitations, solicitation by lawyers is commercial speech, *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978), and hence not subject to the exacting scrutiny required here.

D.

Section 57-61.1B of the Virginia Code permits the Commissioner of the Office of Consumer Services to

suspend or revoke the registration of a solicitor if certain provisions of the Act are violated. It provides:

> If the Commissioner at any time determines that (i) the requirements of § 57-49 or § 57-61 have not been met, or (ii) the registrant has violated, within the preceding twelve months, any requirement of §§ 57-54, 57-55.2 or 57-57 or any regulations adopted pursuant to 57-66, then the Commissioner may suspend or revoke the registration by a written case decision made in conformance with the Administrative Process Act (§ 9-6.14 1 et seq.)

Telco contends that § 57-61.1B operates as a prior restraint upon speech by permitting the state to silence charitable speech on the basis of violations, either unrelated to speech or of minimal consequence. The Commonwealth, on the other hand, asserts that § 57-61.1B embodies its entire scheme of regulatory enforcement without which it would be left helpless to sanction widespread fraud and abuse. In the abstract, these are both powerful contentions. We find the records and pleadings inadequate, however, to determine the precise operation of § 57-61.1B in this case and therefore dismiss plaintiff's claim. Likewise, § 57-61.1C, which sets forth the procedures by which the sanctions are applied, was not discussed by the parties and need not be addressed in this case.

Jurisdiction should only be exercised when "the case 'tenders the underlying constitutional issues in clean-cut and concrete form.' " *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972), quoting *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947). *See also Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 494-95

(1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 294-95 (1981). Here, "we know very little more about the operation of the [Virginia procedure] as a result of this lawsuit than we would if a prospective plaintiff who had never set foot in [Virginia] had simply picked this" off the statute books and filed this lawsuit. *Gilligan* 406 U.S. at 588. While some grounds for suspension or revocation may be permissible, others may not. Uneven enforcement of sanctions for trivial reasons might implicate First Amendment concerns; sanctions for gross fraud would not. The state and district courts have also taken divergent views of the statute's meaning-views which might bear upon the section's constitutionality. The state, for example, contends that the maximum period of revocation pursuant to § 57-61.B is 12 months, while the district court notes that this section does not "limit revocation to a period of only 12 months." To permit state courts to construe this state statute may therefore prove useful. *See Rescue Army*, 331 U.S. at 584. In short, while Telco may meet the minimal requirements of standing, and may be a party to a case or controversy, its case "has not given any particularity" to the effect upon it of § 57-61.1B. *Gilligan*, 406 U.S. at 588.

As can readily be seen from the cross-references in § 57-61.1B, the sanctions challenged in this section also cover a spectrum of activities, from the filing of a registration statement with the Commonwealth to the misleading of the public with regard to the status of the solicitor. The sanctions, however, have never been applied to Telco. We have no idea whether Telco has violated, or is accused of violating, any of the underlying provisions to which the sanctions would apply. The record is so sparse and

the challenge to this section so generalized as to give it all the earmarks of unripeness. We do not, on this account, foreclose facial challenges to state statutes in federal court. We do, however, require that the party bringing such a challenge present a more particularized view as to the impact of the challenged provision upon its own activities.

The dissent maintains that *Younger* abstention would have been a more appropriate means of avoiding premature adjudication. We disagree. It would have been improper for the district court to abstain from the case entirely to avoid discrete issues not yet ripe for review. The Article III doctrines of justiciability do serve, however, as a supplementary guarantee that federal courts will not engage in premature interference with state proceedings. Indeed, there is nothing to prevent the state from pursuing the proceedings against Telco free of the singular constitutional taint of the prior restraint.

IV.

In summary, we find Telco's challenge to the percentage disclosure requirement in Va. Code Ann. § 57-55.1 to be moot. Likewise, we find no justiciable controversy with respect to the suspension and revocation requirements in Va. Code Ann. § 57-61.1B and C. We thus vacate the judgment of the district court and remand with directions to dismiss without prejudice this section of plaintiff's complaint. We hold that Va. Code Ann. § 57-55.2, which requires notification to potential donors of financial statements on file with the state, is a permissible

exercise of Virginia's power to regulate professional solicitations. We thus reverse the judgment of the district court as to this claim. Finally, we affirm the district court's judgment that the submission of solicitation scripts required by Va. Code Ann. § 57-61.1D is an unconstitutional prior restraint upon First Amendment freedoms.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

HALL, Circuit Judge, dissenting:

The majority believes that this is a First Amendment case. It is not. The majority believes that "we must determine" the constitutionality of several provisions of Virginia's charitable solicitation laws. Slip op. p. 3. We do not. As a matter of comity, we must not. This is an abstention case. It is about federal-state relations in our system of government and a proper respect for the important role of informal procedures in the administrative process. Because the majority fails to recognize that we must abstain, I respectfully dissent.

I.

As the majority points out, the doctrine of *Younger* abstention stands as an exception to the rule that federal courts must decide cases within their jurisdiction. Slip Op. at 6; *see also New Orleans Public Service, Inc. v. Council of City of New Orleans*, ___ U.S. ___, 109 S.Ct. 2506, 2512-13 (1989). However, this doctrine also stands in recognition of the important considerations of comity and respect for

state government that are so fundamental to our federal system. *Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (known as "Our Federalism"). Thus, *Younger* abstention serves as a mechanism to reconcile two competing policy considerations – the federal courts' duty to respect ongoing state proceedings and their mission to ensure that federal rights are vindicated. Slip Op. p. 9. When these two considerations come into conflict, as they do in this case, *Younger* routinely requires that federal courts must abstain:

> Because of our concerns for comity and federalism, we thought that it was "perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions."

Ohio Civ. Rights Comm. v. Dayton Christian Schools, Inc., 477 U.S. 619, 627 (1986) (emphasis in original, citation omitted). As *Dayton* itself held, the same considerations are controlling for requests to enjoin ongoing administrative proceedings. As long as administrative litigants are given an opportunity to raise their constitutional concerns, the respect accorded to state administrative proceedings must be similar to that given to state court proceedings. It is easy to see why this is so. States must be left free to enforce their laws either administratively or judicially as they see fit. Any other result would undermine the very foundations of *Younger*:

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their

> institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44, *cited in City of New Orleans*, 109 S.Ct. at 2516. Thus, although abstention is an exception to the general rule that federal courts must exercise their jurisdiction, *Younger* and its progeny require that ongoing state administrative proceedings be given deference by the federal courts.

II.

In *Middlesex Co. Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1983), the Supreme Court fashioned a threefold inquiry to determine when abstention is necessary:

> *first*, do [the state proceedings] constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

(emphasis in original). As applied to this case, I believe that the majority would agree with me that the last two prongs of the inquiry have been met. Virginia's interest in protecting its citizenry from fraud through administratively enforced charitable solicitation laws is certainly important. Slip Op. p. 14. Likewise, Telco's opportunity to raise its constitutional concerns both before OCA and on direct appeal in the Virginia Commonwealth courts (pursuant to *Va. Code Ann.* §§ 9-6.14:16, 57-67) clearly satisfies the third prong. *See Middlesex*, 457 U.S. at 436; *Dayton*, 477 U.S. at 629. Thus, we are in disagreement only as to whether there is an ongoing state proceeding to which we

should defer and whether that proceeding is sufficiently "judicial" in nature to merit abstention.[1] I address these issues in turn.

A.

"Ongoing" means "being actually in process" or "continuously moving forward." Webster's New Collegiate Dictionary, 802 (5th Ed. 1977). Here, there can be no question that OCA enforcement proceeding was actually in process prior to Telco's filing in district court. The facts surrounding this proceeding conclusively prove this point.

After receiving a complaint about Telco's operation, OCA began an investigation in late March, 1988. On June 3, at the request of Telco, OCA sent a four-page letter to Telco's counsel which detailed the nature of the alleged

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[1] Telco has not argued and the record does not show the presence of any of the exceptions to *Younger* abstention, such as bad faith or harassment on the part of OCA. Further, contrary to the majority's protestations, these statutes are not plainly unconstitutional so that abstention is unnecessary. The *Younger* court itself carved such an exception to its rule of abstention, but it did so very narrowly:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in *every* clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. *Id.* at 54-55, *quoting Watson v. Buck*, 313 U.S. 387, 402 (1941) (emphasis added).

One need look no further than the majority's holding on the merits to see that the *Younger* doctrine does apply in this case.

violations under investigation, as well as the dates and particular solicitation campaigns during which they supposedly occurred. The letter concluded by proposing that an informal fact-finding conference be held to resolve the allegations. A separate cover letter advised Telco of the purpose of the proposed conference. On July 6, an unsuccessful conference was held. Afterwards, OCA continued its enforcement activities by requesting, through counsel, certain Telco records. As it became clear that OCA was about to instigate formal revocation proceedings, Telco filed this action in federal court on July 21. At that time, OCA ceased its enforcement efforts pending its request to the district court to abstain. This request was denied.

The majority seems to base its conclusion that there was not an ongoing proceeding on the fact that OCA had not yet commenced a formal revocation hearing. Such a freeze-frame perspective of OCA enforcement, however, ignores the reality of administrative process.

Suspension or revocation of a solicitor's registration under *Va. Code Ann.* § 57-61.1 is accomplished through the procedures of the Virginia Administrative Process Act ("APA") *Va. Code Ann.* § 9-6.14:1 *et seq.* After a complaint is filed with and investigated by OCA, an informal fact-finding conference is held between the agency and the suspect registrant. *Va. Code Ann.* § 9-6.14:11. If this conference does not produce a consensual resolution of the problem, a formal, trial-like proceeding is convened to decide the dispute. § 9-6.14:12. Thus, APA contemplates a two-step decision-making procedure in which the informal conference plays an integral role. The conference serves as a mechanism through which an agency can use its persuasive power to resolve a dispute quickly and

inexpensively, obviating the need for a formal hearing. The Virginia General Assembly clearly intended as much.

The Revisor's Notes to § 9-6.14:11 sketch the fact-finding conference's place in the administrative process:

> They [informal conferences] account for by far the greater bulk of administrative operations of a regulatory nature. To exclude them would be to ignore the larger part of the subject. To prevent or seem to prevent them would radically alter, if not disastrously impair, an important tool of today's governance. . . .
>
> But, while this section is designed as the primary provision respecting case decisions where basic laws do not require an agency hearing, it may also serve, in the discretion of agencies concerned and upon consent of the private parties, as a preliminary or pretrial method of settling or simplifying cases in which there is a statutory right to a trial-like agency hearing.

Thus, it is evident that these conferences are an important step in APA process as well as in OCA's scheme of enforcement. Consequently, to hold that no state enforcement proceeding is ongoing *after* one of these pretrial conferences has been held, makes no sense. Under the majority's reasoning, only if a formal hearing were scheduled would there be an ongoing proceeding. This view completely ignores the continuous nature of administrative proceedings and disregards this "important tool" of Virginia governance. While in some situations it may be difficult to determine when a case is "ongoing" before a state administrative agency, I have no trouble in concluding that after this enforcement proceeding progressed past the informal conference stage, it was

ongoing for *Younger* abstention purposes. The case law on point supports this conclusion.

The majority's contention that *Dayton* and *Middlesex* support its determination that there was no ongoing state proceeding has been soundly rejected by another circuit. In *University Club v. City of New York*, 842 F.2d 37 (2d Cir. 1988), the New York City Human Rights Commission was sued by two of the City's private clubs. The Commission had begun an investigation into alleged discriminatory practices at several private clubs. In January, 1986, the Commission filed a complaint against two of the clubs which initiated a formal investigatory period. This investigation culminated in a probable cause determination in July, 1986, at which time the Commission sought to *schedule* a conciliation meeting. In the meantime, several months earlier in March, the federal plaintiffs filed suit to enjoin the pending administrative proceedings. *Id.* at 39. In finding abstention the only appropriate course, the Second Circuit saw no conflict with *Middlesex* and found its case and *Dayton* indistinguishable:

> In both cases the administrative posture was the same: the commissions were proceeding with conciliation efforts and adjudication of the charges, when the targets of the investigations brought suit in federal district court to halt the administrative actions because of alleged infringement of constitutional rights.

Id. at 40. The court had little trouble in concluding that a state proceeding was ongoing. It reasoned that "the administrative agency in this case has not yet conducted its formal hearing or imposed any sanctions; hence, an

ongoing state proceeding exists." *Id.* at 40 (citation omitted). This is the exact, common sense reasoning that should control this case.

Not only has the majority's decision brought us in conflict with the Second Circuit, but it is clearly at odds with one of our own prior decisions. In *American Civil Liberties Union v. Bozardt*, 539 F.2d 340 (4th Cir.), *cert. denied*, 429 U.S. 1022 (1976), we upheld a district court's decision to abstain from enjoining the Board of Commissioners on Grievances and Discipline of the South Carolina Bar from investigating a complaint filed against one of the state's attorneys. There, the federal plaintiff filed her suit at the investigation stage of the proceedings, long before any formal hearing was held. *Id.* at 342. We held then, as I would hold now, that "principles of comity and federalism require that the federal courts not be permitted to interfere in the ongoing state proceedings." *Id.* We emphasized that the plaintiff's opportunity to have her constitutional challenges addressed in state court (and eventually in the United States Supreme Court) justified the decision to abstain. *Id.*

The reasoning of these cases squarely controls this case, especially in regard to the majority's assertion that these proceedings have not advanced far enough to merit federal deference. Here, a complaint was filed with OCA months before this federal action was filed and the agency had investigated the complaint and had held an informal fact-finding conference. The proceedings in *University Club* and *Bozardt* had not progressed nearly as far and both courts found abstention necessary. I would do the same.

Most importantly, and most unfortunately, the majority's decision has the practical effect of eviscerating OCA's ability to efficiently enforce Virginia's charitable solicitation laws. Now, if the agency wants to retain jurisdiction to investigate and enforce the Commonwealth's laws, to avoid the potential of federal interference it will likely skip the cost-effective informal conference stage of the state's administrative process and go straight to a formal hearing. This unfortunate result seems to flow from the district court's and the majority's misconception that Telco was a party caught in limbo awaiting an arbitrary state agency's decision whether or not to prosecute. Nothing could have been further from the truth. The decision to prosecute had been made and this was an ongoing enforcement action which was proceeding at a respectable pace.[2] But for Telco's request to enjoin that prosecution, it is undisputed that the second stage of the APA enforcement process, formal proceedings, would have been held. Telco has attempted to, and has apparently succeeded in, making an end-run around the state administrative process and into the federal courts. This is just the type of disruption of ongoing state administrative proceedings that a developed sense of comity cannot allow.

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[2] This is also why there was no "chilling effect" to Telco's First Amendment rights. Regardless, even if Telco's First Amendment rights were slightly chilled, this is certainly not enough to justify federal intervention. *Younger*, 401 U.S. at 5051.

B.

The majority's failure to recognize the continuous nature of administrative process leads it to a second erroneous conclusion, that OCA's proceeding was not "judicial" in character. By focusing on the procedures of the informal fact-finding conference alone, it ignores the fact that the conference is only the first step of a two-part enforcement scheme which culminates in a formal trial-like hearing that even the majority would find "judicial."[3] However, the majority's conclusion is flawed in another, equally fundamental, respect. By requiring the presence of formal, trial-like procedures before a proceeding can be considered "judicial," the majority again fails to recognize administrative reality.

As *Middlesex* and *Dayton* made clear, state administrative proceedings can be sufficiently "judicial" in nature to warrant *Younger* abstention. *Middlesex*, 457 U.S. at 432-34; *Dayton*, 477 U.S. at 627. In neither case did the Supreme Court make its conclusion dependant on the presence or absence of formal procedural trappings.[4] In

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[3] The majority also ignores the many procedural safeguards that informal fact-finding conferences have – notice of the conference, right to appear in person or by counsel, notice of all adverse information in possession of the agency, and a prompt decision made in writing if adverse to the litigant. *Va. Code Ann.* § 9-6.14:02.

[4] This lack of emphasis on procedure is no accident. The Supreme Court has not employed such an analysis for very obvious and very persuasive reasons. In the interest of efficiency and economy, administrative agencies frequently make "judicial decisions," without employing formal legal procedures. The majority's opinion would undermine the benefits

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Middlesex, the court did not scrutinize the procedures used by the local bar District Ethics Committees. The fact that the agency had or had not gotten to the formal hearing stage was irrelevant because "[f]rom the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint." *Id.* at 433 (citation omitted). Thus, filing of the complaint was the controlling factor for abstention purposes in *Middlesex;* an act which occurred months before Telco filed this suit. In *Dayton*, the court stressed the fact of eventual state court review in concluding that the Ohio Civil Rights Commission proceedings were judicial. *Id.* at 619-20. In the case at bar, Telco unquestionably has the opportunity for the Virginia Commonwealth courts to review its claims.

Thus, although I think that it is wrong to analyze it as such, even the informal fact-finding conference standing alone, divorced from the second step of the APA process, is a judicial proceeding worthy of our abstention. Unquestionably, the entire APA process of which this conference is only a part is a judicial undertaking. In sum, I think that the OCA's enforcement proceedings were ongoing at the time Telco filed this suit and were "judicial" in nature for purposes of *Younger* abstention.[5]

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of administrative efficiency and lead to increased formalism by not according informal agency actions the deference they are due. It will also lead to an erosion of the deference due to the administrative workings of Virginia's sovereign Commonwealth government.

[5] The *Dayton* court did allude to two situations where abstention in favor of state administrative proceedings might

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III.

Having determined that OCA's enforcement effort was an ongoing judicial proceeding for purposes of *Younger*, I believe that both the district court and the panel erred in not abstaining from the case. I would reverse on this point and would not reach the merits of this appeal. Consequently, I do not express any opinion on the majority's First Amendment analysis other than to make one observation.

It seems to me that the mootness and ripeness problems encountered by the majority are a direct consequence of taking this case before judicial review was appropriate. If the majority would have abstained, the Virginia courts would not face the problem of determining whether the challenge to § 57-55.1 is actually moot and which of the suspension and revocation provisions of 57-61.1B are constitutionally suspect. This is so because

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not be appropriate; neither is applicable here. The first is if state law expressly indicates that the proceedings are not "judicial in nature." A variant of this exception was recently found controlling in *City of New Orleans*, where the Supreme Court found abstention inappropriate when a plaintiff sought to enjoin an agency's rate-making proceedings – a clearly legislative (rule-making) act. *Id.* at 2519-2520. Here, the Revisor's Note to § 9-6.14:11 plainly states that the provision is concerned with the "judicial" operations of agencies. The second exception is if the proceedings are remedial rather than coercive in nature. Of course, these enforcement proceedings, which were intended to revoke or suspend Telco's registration if violations were proven, were coercive. *See University Club*, 842 F.2d at 42 (potential of civil penalties makes proceeding coercive).

the Virginia courts would have had before them a fully-developed administrative record that would reveal exactly how the revocation provisions were applied and whether or not OCA relied upon § 57-55.1. Thus, the best argument for *Younger* abstention is the most obvious. This case is simply not ready for judicial review.

A sense of respect for Virginia's right to administratively enforce its laws, and a sense of awareness of the importance of informal procedures in the administrative process demand that we abstain in this case. Accordingly, I would reverse the district court and remand with instructions to abstain until the culmination of the administrative process and any subsequent Commonwealth court appellate review. Because the majority has not chosen this course, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2668

TELCO COMMUNICATIONS, INC.

Plaintiff – Appellee

v.

S. MASON CARBAUGH, as he is Commissioner of the Department of Agriculture and Consumer Services of the Commonwealth of Virginia,;

Defendant – Appellant

VIRGINIA STATE LODGE, FRATERNAL ORDER OF POLICE

Amicus Curiae

v.

STATE OF CONNECTICUT; STATE OF MARYLAND; STATE OF NORTH CAROLINA; STATE OF WEST VIRGINIA

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing in Banc

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(Filed Nov. 9, 1989)

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to the Court.

The panel considered the petition for rehearing and is of the opinion that it should be denied. Judge Hall voted to rehear the case. Judge Wilkinson and Judge

Williams, United States District Judge, sitting by designation, voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Widener, Hall, Murnaghan, and Chapman voted to grant rehearing in banc; and Chief Judge Ervin and Judges Winter, Russell, Phillips, Sprouse, Wilkinson, and Wilkins voted to deny rehearing in banc.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson.

For the Court,

John M. Greacen
CLERK